

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SCOTT AND RHONDA BURNETT, RYAN)
HENDRICKSON, JEROD BRIET, SCOTT)
TRUPIANO, JEREMY KEEL, HOLLEE ELLIS,)
and FRANCES HARVEY, on behalf of themselves)
and all others similarly situated,)
Plaintiffs)
v.) Case No. 19-CV-00332-SRB
THE NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS CORP.,)
HOMESERVICES OF AMERICAN, INC., BHH)
AFFILIATES, LLC, HSF AFFILIATES, LLC,)
RE/MAX LLC, and KELLER WILLIAMS)
REALTY, INC.,)
Defendants.)

PLAINTIFFS' MOTION IN LIMINE # 25

Plaintiffs and Anywhere have reached a settlement agreement. Because this case involves joint and several liability, Plaintiffs will still present their case as to Anywhere's participation in the conspiracy. But Plaintiffs anticipate that Defendants may argue to the jury that they had no business dealings with Anywhere's clients, and that they should not be liable for damages based on commissions collected from Anywhere's clients for that reason. The Court should prohibit Defendants from doing so.

Under the Sherman Act, co-conspirators are jointly and severally liable, and each co-conspirator is liable for all damages flowing from the conspiracy. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (“joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants”); *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir. 2002) (“each member of a conspiracy is liable for all damages caused by the conspiracy’s entire output”);

ABA Model Sherman Act Instruction 6.B.17 (“each conspirator is fully liable for all of the damages caused by the conspiracy and not solely for damages caused by an individual conspirator”). “A co-conspirator is liable for all acts committed in furtherance of a conspiracy, regardless of when it entered the conspiracy.” *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 538 (D.N.J. 2004).

Joint and several liability applies when one or more of the co-conspirators has settled. *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2004 WL 6248154, at *5 (E.D. Pa. Sept. 27, 2004) (“due to the possibility of the joint and several liability of the Defendants on the antitrust conspiracy claim, Plaintiffs’ settlement with BASF and DuPont should not have a negative impact on Plaintiffs’ ability to recover damages should the nonsettling Defendants be found liable.”) (citing *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 208 (E.D.Pa.2001)), *aff’d*, 305 F.3d 145 (3d Cir.2002), *cert. denied*, 538 U.S. 977 (2003). “Thus, when one defendant offers to settle with the class, the plaintiffs may retain the right to seek recovery against nonsettling defendants for all their claims, including claims raised against the settling defendant.” *Id. See also In re Disposable Contact Lens Antitrust Litig.*, No. 3:15-MD-2626-HES-JRK, 2021 WL 3417613, at *4 (M.D. Fla. May 31, 2021) (“this is a partial settlement of the Action in a multi-defendant antitrust case, meaning that if Plaintiffs’ claims are proven at trial, non-settling defendants will remain liable for all class damages under principles of joint and several liability”).

As a result, evidence or arguments that a Defendant should not be responsible for the commissions charged by Anywhere should be prohibited because it is an incorrect statement of the law. It is also irrelevant to any question posed to the jury. And finally, even if there was some relevance, such evidence would prejudice the parties because it could lead the jury to think that the settlement makes Anywhere’s participation in the conspiracy less likely and impermissibly lead the jury to find against Plaintiffs with respect to Anywhere’s participation in the conspiracy. Or the jury could think the opposite; that Anywhere must have been more liable than non-settling defendants. Either way, the settlement is not evidence that is relevant to the issues before the jury and risks confusion.

Dated: September 5, 2023

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